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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264

TO: The Commission

Petition for Reconsideration of
Center for Media Education
Consumer Federation of America

Lisa M. Stevens
Graduate Fellow

Jim Black
Student Intern

Angela J. Campbell
Institute for Public Representation
Citizens Communications Center Project
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Counsel for CME et al.

December 15, 1993

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SUMMARY

CME/CFA seek reconsideration of the Commission's Second Report and Order adopting subscriber and channel occupancy limits for cable operators. Both limits are too high to achieve the diversity and competition that Congress intended. If left unchanged, the Commission's rules will only further concentration of control, stifle First Amendment diversity, and undermine the potential of higher capacity multichannel systems to result in greater diversity for consumers.

CME/CFA urge the Commission to reconsider its decision to permit MSOs to control up to 30% (and in some cases 35%) of cable subscribers nationwide. This limit will not prevent MSOs from impeding the flow of video programming to consumers as Congress intended. In establishing the 30% limit, the Commission seemed primarily concerned with avoiding divestiture, rather than determining the level of concentration that best serves the public interest. It ignored testimony showing the large cable MSOs already exercise market power at existing levels of horizontal concentration. The proposed consent decree between the FTC and TCI/LMC and the antitrust suit filed against TCI by Viacom provide further evidence that existing levels of concentration are too high. The Commission also fails to address Congress' separate first amendment diversity concerns.

Reconsideration of the horizontal limits is also required because of the Bell Atlantic's proposed acquisition of TCI and other cable-telephone company mergers announced after the

Commission adopted its rules. The rules premised on the notion of competition between cable and telephone companies should be evaluated in light of these major changes, and at a minimum, subscribers of telephone companies affiliated with cable companies should be included within the horizontal limits.

CME/CFA also ask that the Commission lower the channel occupancy limits. The combination of a 40% limit with the inclusion of PEG, leased access, and must carry channels when calculating system capacity results in very little channels being available for unaffiliated programming.

CME/CFA also seek reconsideration of the Commission's decisions to apply channel occupancy limits to only the first 75 channels and to grandfather existing carriage arrangements. By establishing a 75 channel threshold, the Commission undermines the promise that new technology will bring greater diversity. Likewise, the Commission's decision to grandfather all existing vertical relationships lacks any basis in the record and undercuts Congress' intent.

Finally, the CFA/CME object that the attribution standards adopted for both subscriber limits and channel occupancy limits--especially the exception for a single majority shareholder-- do not realistically take into account the influence exercised by large vertically integrated MSO and should be strengthened on reconsideration.

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TO: The Commission

Petition for Reconsideration

Pursuant to Section 1.429 of the Rules, 47 C.F.R. § 1.429, the Center for Media Education and the Consumer Federation of America (hereinafter referred to as "CME/CFA") respectfully ask the Commission to reconsider it decision regarding cable ownership limits in Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limitations, Second Report and Order, FCC 93-456 (rel. Oct. 22, 1993), summarized at 58 Fed. Reg. 60135 (Nov. 15, 1993) ("Second Report and Order").

In Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress amended Section 613 of the Communications Act, 47 U.S.C. § 533, to direct the Commission to adopt limits on the numbers of subscribers reached by a cable system ("horizontal limits") and the number of channels on a cable system that can be occupied by affiliated video programmers ("channel occupancy limits"). Congress further directed the Commission to

> ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer.

47 U.S.C. § 533(f)(2)(A) (1993).

Unfortunately, both the subscriber and channel occupancy limits adopted by the Commission are far too high to achieve this objective. In addition, the recently announced merger between TCI and Bell Atlantic and other cable-telephone company mergers creates new hybrids of monopoly control which requires that the FCC consider how its horizontal should apply to homes passed by both traditional cable systems and affiliated telephone systems capable of transmitting video programming.

CME/CFA, as representatives of consumers injured by the adoption of these rules, urge the Commission to lower substantially both the horizontal limits and the channel occupancy limits, clarify the application of the horizontal limits to telephone subscribers, and adopt other changes suggested below to carry out Congress' intent.

I. The Commission Should Adopt A Lower Horizontal Limit Because The Existing Levels Of Horizontal Concentration Are Contrary To The Public Interest.

Congress directed the FCC to adopt horizontal limits because it was concerned about increasing concentration in the cable industry. Specifically, the Senate Report explains:

> This increase in concentration raises two major concerns. First, there are special concerns about concentration of the media in the hands of a few who may control the dissemination of information. The concern is that the media gatekeepers will (1) slant

information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both. . . The second concern about horizontal concentration is that it can be the basis of anticompetitive acts.

S. Rep. No. 92, 102d Cong., 1st Sess. 32-33 ("S. Rep.").[1]

The Commission errs in giving insufficient consideration to the diversity concern. The Second Report and Order devotes only a single sentence to this important Congressional concern: "We also believe that this [30%] limit combined with the above mentioned provisions will be appropriate to address the diversity aims which underlie the statutory horizontal ownership provisions." Second Report and Order, at ¶ 26.[2] Thus, the Commission must explain how permitting a single cable company to control 30% of households is consistent with promoting diversity.[3] Promoting First Amendment diversity may well require

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[1] The Conference Committee adopted the Senate provisions. H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 82 (1992).

[2] The other provisions referred to, are Sections 12, 19 of the Cable Act, the must carry provisions and leased access. These provisions do not address Congress's concern with ensuring diversity by limiting horizontal concentration. The distinct purpose of the must carry are discussed infra at 16. Section 19 is concerned with promoting the availability of programming by satellite. Only Section 12, which requires the FCC to regulate carriage agreements, touches on some of the same concerns. But the Commission itself has frequently recognized that structural regulations, such as ownership limits, provide a superior means of promoting diversity compared to behavioral regulations, such as those mandated by section 12.

[3] CME/CFA notes in this regard, that the national ownership limits for television stations, which are also intended to promote both diversity and economic competition are substantially lower. Television broadcasters, which face direct competition from many other television stations on a local level, are currently restricted to owning stations that have an aggregate national audience of 25% or less. 47 C.F.R §

limits below that needed to address anticompetitive concerns alone.

Turning to Congress' second concern, it is clear that the drafters of the legislation believed that large MSOs already have market power at existing levels of horizontal concentration. The Senate Report notes that

> [w]itnesses at the hearings testified that, with the increased concentration in the cable industry, the large MSOs have the market power to determine what programming services can "make it" on cable. They also argued that the large MSOs force programmers to buy their way onto cable by giving up an equity interest in their programming.

S. Rep. at 33. <u>See also</u> <u>id.</u> at 24 (describing testimony about cable operators exercising their market power derived from control over local distribution facilities). Thus, the Commission erred in failing to acknowledge that existing levels of horizontal concentration are too high. On reconsideration, the Commission should establish subscriber limits low enough (probably in the range of 10-20%) that no single MSO or group of MSOs can determine what programming will be available to consumers.

A. The Commission Should Not Set Limits To Avoid Divestiture of Existing Cable Systems.

In determining that the horizontal limit should be 30% of homes passed, the Commission appears to have been only concerned

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73.3555(d)(2)(ii). Since cable operators control the content of the programming on <u>every</u> channel, as opposed to broadcasters, which control the content on just <u>one</u> channel, if anything, subscriber limits for cable operators should be set below the audience limits set for broadcast television stations.

with avoiding a confrontation with one big company, TCI, and not with what was best for the public. In the July 23, 1993 Further Notice of Proposed Rulemaking, the Commission proposed to adopt a national subscriber limit of 25% of homes passed, because it "will not require divestiture by any cable operator." Implementation of Sections 11 and 13 of the Cable protection and Competition Act of 1992, Horizontal and Vertical Ownership Limitations and Anti-trafficking Provisions, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 6828, 6850, ¶ 134 (1993) ("FNPRM"). But, in the Second Report and Order, the Commission decided to adopt a 30% horizontal limit instead. Second Report and Order at ¶ 27. The Commission notes that "the largest existing MSO, TCI, using the attribution standards adopted herein, has an interest in cable systems passing approximately 23.8 million homes or 27% of home passed nationwide." Id. at n.40.[4] This increase in the limit evidently results from the Commission's desire not to force TCI to divest any of its systems.

The only reason the Commission offers to justify avoiding divestiture is that "Congress did not intend necessarily to require the divestiture of any existing interests." Id. at ¶ 27, citing S. Rep. at 34. This is not a sound reason on which to base a policy judgement. There is nothing in the legislative

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[4] It is unclear whether TCI increased its market share between the time of the FNPRM and the Second Report and Order, or whether the difference stems from the different methods of attributing ownership.

history that should discourage the Commission from setting subscriber limits that might force the larger MSOs to divest. The Senate Report states that:

> [t]o address the issue of national concentration in the cable industry and enhance effective competition, the legislation directs the FCC to place reasonable limits on the size of MSOs (by the number of subscribers). . . The legislation does not imply that any existing company must be divested and gives the FCC flexibility to determine what limits are reasonable and necessary.

S. Rep. at 34. Thus, the Senate Report clearly does not prohibit the FCC from ordering divestiture, and indeed, indicates that the Commission should handle the issue in the way that best promotes Congress' objectives, even if that means divestiture.[5]

Here, there is no reason for the Commission to shy away from regulation that would force divestiture of cable operators.[6] As demonstrated below, lower horizontal limits are essential to achieve the level of competitiveness and diversity that Congress

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[5] The House Report also refrains from prohibiting the Commission from ordering divestiture of MSOs to achieve the desired diversity and competition in the video market place. In the Report, the Committee expresses concern over TCI's control of almost 25% of all cable subscribers stating that "although that figure may be low relative to other industries, the Committee believes that it may be quite significant depending on the subscriber level needed to launch and sustain a cable programming service." H.R. Rep. No. 628, 102d Cong., 2d Sess. 42 ("H. Rep.").

[6] The Commission has ordered divestiture in the past where appropriate. See, e.g., FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (divestiture of combined newspaper and television stations upheld as promoting the public interest in diversification of the mass media); Capital Cities Communications, Inc., 59 RR 2d 451 (1985); Metromedia Radio & Television, Inc., 102 FCC 2d 1334 (1985); Knoxville Channel 8 Limited Partnership, 4 FCC Rcd 4760 (1989).

intended when it directed the Commission to promulgate the regulations.

B. TCI Already Has Market Power And Uses It To Disadvantage Competing Program Services

The Commission properly acknowledges that Congress was particularly concerned with "the possibility that large horizontally integrated MSOs might have the ability to preclude the launch of new video programming services." Second Report and Order at ¶ 25. Yet, the Commission concludes that "[a] 30% horizontal ownership limit is generally appropriate to prevent the nation's largest MSOs from gaining enhanced leverage from increased horizontal concentration." Id.

This conclusion is at odds with findings in the Senate Report. For example, the Senate Report cites testimony that "the large MSOs have the market power to determine what programming services can 'make it' on cable," and that "[a]s a practical matter, it is almost impossible in the present environment to start a new cable system without surrendering equity to the owners of the monopoly cable conduits." S. Rep. at 33, 24. It goes on to observe: "Programmers either deal with operator of [monopoly] systems on their terms or face the threat of not being carried in that market. The Committee believes this disrupts the crucial relationship between he content provider and the consumer." Id. at 24.

Congress' concerns about the ability of large MSOs to disrupt the flow of video programming information have been confirmed by two recent developments. First, the Federal Trade

Commission (FTC) recently proposed to enter into a consent agreement with TCI and its affiliate Liberty Media Corporation (LMC), which would require them to divest their interest in QVC Network, Inc., a cable programmer, if QVC is successful in its attempt to takeover Paramount. TeleCommunications, Inc, et al.; Proposed Consent Agreement with Analysis to Aid Public Comment, 58 Fed. Reg. 63167 (Nov. 30, 1993)("Proposed Consent Decree"). The FTC's Acting Director of the Bureau of Competition explains the competitive concerns raised by the Paramount acquisition:

> First, at the programming packaging level, TCI/LMC's influence over Paramount allegedly may tend to lessen competition or tend to create a monopoly in the market for cable television premium movie channels. Second, the complaint allegation regarding the distribution market reflects a concern that the proposed acquisition could make it necessary for entrants into the distribution market to enter the programming level as well. . . Since the alleged competitive problems stem from the vertical link between TCI/LMC and QVC, the FTC's consent order addresses them by severing that link.

Statement of Mary Lou Steptoe before the Senate Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary 5-6 (Nov. 18, 1993). TCI's influence, of course, derives from the large number of subscribers to which it controls access. See id. at 2-3 (noting that "TCI is by far the largest cable television multiple system operator" and it "control[s] distribution of cable programming to about 25% of all cable television subscriber in the United States"). See also Proposed Consent Decree, 58 Fed. Reg. at 63172.

Second, Viacom has made similar allegations of TCI's use of its control over subscribers to interfere with the flow of programming to consumers in its antitrust suit filed against TCI and others. Viacom International, Inc. v. Telecommunications, Inc., Liberty Media, et. al, Civ. No. 93-CIV6658(KC) (filed S.D.N.Y. Sept. 23, 1993)("Viacom Complaint"). Viacom asserts that TCI has "amassed local cable monopolies controlling approximately one in four of all cable households in the United States." Viacom Complaint at ¶3. Viacom's Complaint explains that "[w]ithout access to [TCI's] cable systems, cable network programmers cannot achieve the 'critical mass' of viewers need to attract national advertising or a sufficient number of subscribers required to make the network viable." Id. at ¶ 4.[7] If TCI can wield its monopoly power to disadvantage such a well-established services as Showtime and The Movie Channel, it certainly has the power to preclude the launch of new programming.

In testimony before the Senate Subcommittee on Antitrust, Monopolies and Business Rights, Sumner Redstone, Chairman of Viacom International, asserted that even without the households added through TCI's merger with Bell Atlantic, "TCI's level of exclusive access gives it the power to 'make or break' cable

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[7] The Complaint describes in detail how TCI and its affiliates have discriminated against Viacom affiliates Showtime and The Movie Channel to benefit competing TCI affiliated services such as Encore Media. Id. For example, Viacom accuses TCI of intentionally stalling negotiations for a new affiliation agreement with Showtime to force Showtime into a merger with TCI affiliate Encore Media. Id. at ¶ 120-23. It also accuses TCI of dropping Viacom's The Movie Channel, which competes with TCI's Encore Media, from 28 systems and threatening to drop it from additional systems. Id. at ¶ 124.

programming services, among other things, as it sees fit." Testimony of Sumner M. Redstone, Chairman, Viacom International, Inc., before the Senate Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary 4 (Oct. 27, 1993) ("Redstone Testimony"). Redstone explains that:

> TCI's "make or break" power derives from the fact that to successfully launch and operate a national cable programming service, that service must reach a sufficient base or 'critical mass' of subscribers in order to generate sufficient advertising revenues or subscriber fees. In the case of a nationwide advertiser-supported basic cable programming service, such as Viacom's MTV and Nickelodeon, the "critical mass" of subscribers required to succeed is roughly 40 million of the current 57 million available subscribers. Premium television services, such as Viacom's Showtime and The Movie Channel, have extraordinarily high fixed costs, and therefore are also heavily dependent on wide distribution and favorable marketing by cable operators in order to amortize those fixed costs. . . . Due to TCI's control of well over 20 percent of cable homes nationwide, a decision by TCI not to carry or favorably market a programming service on its exclusive-access cable systems would require that the service, at a minimum, be carried by nearly every other cable system in the United States for it to succeed commercially -- an impossible hurdle to overcome.

Id. at 4-5.

Other examples of TCI's successful use of its monopoly power to disadvantage competitors include: pressuring NBC into changing the focus of its all news cable network, the Consumer News and Business Channel (CNBC), so that it would not compete with Turner Broadcasting's CNN, in which TCI owns an interest, id. at 6; demanding an equity interest in programming, such as Court TV, as a condition to carriage, id. at 8; and threatening to stop carrying The Learning Channel, thus forcing Lifetime to withdraw its offer to buy The Learning Channel, leaving The Learning Channel no choice but to accept the lower offer from TCI's affiliated Discovery Channel, Viacom Complaint at ¶ 126.

These examples, many of which are well known to the Commission, show that TCI, with ownership levels below the FCC limits, presently possesses sufficient market power to impede the flow of video programming to consumers. Thus, the Commission should re-examine its decision to set the horizontal ownership limits at 30%.

II. The Horizontal Ownership Limits Should Include Telephone Subscribers.

In promulgating regulations setting cable horizontal ownership limits, the Commission adopted a standard that includes all homes that are "passed" by a cable operator instead of a "subscriber based" standard. The Commission, and indeed all of the commenters, preferred the "homes passed" standard because it "encompasses all <u>potential</u> cable subscribers," and is "a more stable basis on which to impose horizontal limits." <u>Second Report and Order</u> at ¶ 24 (emphasis added). The Commission also concluded that the "homes passed" standard better reflects a cable operators potential reach because it includes "all of the cable homes to which a particular cable operator controls access." <u>Id.</u>

After the Commission adopted these regulations on September 23, 1993, Bell Atlantic and TCI announced their intention to merge on October 13, 1993. If approved, the merged Bell Atlantic/TCI will have "access to [an] estimated 40% of all U.S.

households, either through Bell Atlantic's telephone lines or TCI's cable systems." Antitrust Charges Aired; TCI Deal Gives Bell Atlantic Access To 40% of U.S. Households, Communications Daily, Oct. 14, 1993, at 1. Moreover, the proposed Bell Atlantic/TCI merger is just one of many proposed cable-telephone companies mergers to be announced in recent months. See, e.g., Rich Brown, Bell May Roll Its Own Programming, Broadcasting & Cable, Oct. 25, 1993, at 32; Southwestern Bell, Cox Go Shopping, Broadcasting & Cable, Dec. 13, 1993 at 6; Bellsouth Joins Cable Bandwagon with Prime Cable Deal, Communications Daily, Oct. 14, 1993, at 7.

Because these mergers were announced after the Commission's decision, the Commission did not consider whether another class of potential cable subscriber, that is, telephone subscribers of a combined cable and telephone company, should be included within the horizontal limits. CME asks the Commission to clarify that customers served by a telephone company that is affiliated with a cable company should be included in the horizontal limits.

The Commission should include such customers because, just as residents of homes passed, they have the a strong "potential" to become cable subscribers. Bell Atlantic, for example, is planning to offer video services over integrated broadband networks throughout its seven-state telephone region. Sean Scully and Rich Brown, Wired Worlds Tie The Knot, Broadcasting & Cable, Oct. 18, 1993, at 6. Bell Atlantic is also planning to launch a video dialtone platform in Virginia that will offer its own programming. Rich Brown, Bell May Roll Its Own Programming, Broadcasting & Cable, Oct. 25, 1993, at 32. Finally, Bell Atlantic's recent victory in the district court, if upheld, will also spur telephone companies to offer video programming directly to consumers.[8]

Failure to count both cable and telephone subscribers toward the horizontal limit would undermine Congressional intent to promote diversity and competition. When MSOs and telephone companies merge, the potential for direct competition in their overlapping areas is removed completely. A result the National Association of Broadcasters says could well "be the nail in the coffin of all those who hoped to see competition to cable emerge." Sean Scully and Rich Brown, Wired Worlds Tie The Knot, Broadcasting & Cable, Oct. 18, 1993, at 6. Also, the potential for smaller video programmers to survive is greatly reduced because of the size and resulting monopoly power of the telephone companies/cable combination. To prevent MSOs from acquiring excess market power through telephone companies mergers, the Commission should clarify that the horizontal limits apply to both telephone subscribers and cable subscribers.

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[8] Until recently telephone companies were prohibited from offering video programming directly to subscribers. Bell Atlantic challenged the constitutionality of this prohibition and won at the district court level. Chesapeake and Potomac Telephone Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), appeal filed Sept. 23, 1993. Although the district court's ruling only applies to Bell Atlantic, other regional holding companies have filed similar challenges.

III. The Commission Should Adopt Lower Channel Occupancy Limits Because the Existing Levels of Vertical Integration are Contrary to the Public Interest

CME\CFA strongly urge the Commission to reconsider its rules establishing limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an attributable interest. Specifically, CME\CFA suggest that the Commission: adopt a the more reasonable channel occupancy limit of 20% suggested in the Senate Report; subtract PEG, broadcast, and leased access channels when calculating system capacity; count affiliated local and regional networks toward the limit; remove the 75 channel capacity threshold beyond which channel occupancy limits do not apply; and decline to grandfather existing vertical relationships.

A. The Combination of the 40% Channel Occupancy Limit and the Inclusion of PEG, Broadcast, and Leased Access Results in Very Few Channels Being Available for Unaffiliated Programming.

The Commission adopted channel occupancy limits in response to Congressional concerns that growing vertical integration in the cable industry creates a substantial market entrance barrier to programmers unaffiliated with a cable operator, thereby substantially limiting the diversity of programming available to consumers. 1992 Cable Act. § 2(a)(4) (codified at 47 U.S.C. § 531). As a result of the complicated vertical relationships in the cable industry, large MSOs with investments in several programmers control both the means of communication and the message communicated to large numbers of Americans. Id. at §2(a)(4)-(5). Congress thought it best to curb this power in order to ensure that cable provided the widest possible diversity of information sources and services to the public. Id. at §2(a)(6). CME\CFA assert that the rules adopted by the Commission do not adequately address Congress' valid concerns. In fact, the rules directly contravene legislative intent by combining an excessively high channel occupancy limit with several exceptions that allow the largest MSOs to carry little or no unaffiliated programming on their systems.

1. The existence of leased access and must carry channels do not diminish the need for stricter channel occupancy limits.

In adopting a 40% channel occupancy limit, the Commission erroneously ignored evidence provided by the Motion Picture Association of America ("MPAA") that a 40% limit could result in instances where no channels are available to unaffiliated programmers.[9] The Commission does not dispute the facts presented by MPAA. Rather, the Commission stated that,

> (f)irst, MPAA's calculation does not take into account the availability of leased access channels to unaffiliated video programmers. Second, MPAA appears to assume that TCI owned systems will drop popular unaffiliated programming services such as ESPN, USA Network, and A&E in favor of other less popular affiliated programming services...Finally, MPAA fails to acknowledge that cable systems carrying the maximum number of broadcast, must carry, and PEG stations are a

[9] MPAA showed that: On a TCI-owned 36-channel system with 12 commercial television stations; 3 public broadcast stations; 4 PEG channels; 14 affiliated networks; 2 local/regional networks; and BET- no channels would be available for unaffiliated networks. On a TCI-owned 54-channel system, five channels would be available to unaffiliated networks. Comments of the Motion Picture Association of America, MM Docket 92-264, at Attachment A (Aug. 23, 1993) ("MPAA Comments").

> devoting substantial capacity to carriage of unaffiliated programming.2

Second Report and Order at 30, n.88.

CME/CFA dispute that must carry and leased access are substitutes for channel occupancy limits. Must carry channels are, of course, only available to local broadcast stations. Leased access, where available at all, has very limited capacity. Further, the non-affiliated programmers would have to pay for access, and the maximum rates established are so high that leased access will not serve as a viable option for most unaffiliated programmers seeking carriage on a cable system. See Petition for Reconsideration filed by CME, et al., in MM Docket No. 92-266 (June 21, 1993).

Further, the Commission's response fails to implement Congress' comprehensive regulatory scheme as set forth in the Cable Act. By including three distinct provisions -- leased access, must carry, and channel occupancy limits -- Congress set out to increase the diversity of ownership and ideas in the cable industry. Each provision has its own specific function. Must carry was designed to promote and support local broadcast stations, which provide valuable information to the local communities they serve. Leased access was intended to be a forum for community programming independent of cable operator control and to serves as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet... in the electronic marketplace of ideas." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984). In contrast, channel occupancy limits are designed to prevent discrimination against unaffiliated programmers, which in turn encourages the development of such programming by ensuring a place for it to air. For the Commission to weaken channel occupancy limits due to the availability of leased access and must carry channels contravenes Congress' whole regulatory intent.

Moreover, it is unclear that cable operators are unlikely to drop popular unaffiliated services such as ESPN, USA Network and A&E. Viacom's allegation that TCI conspired to eliminate Showtime is a prime example of such conduct. Viacom Complaint at ¶¶ 111-114. As long as large MSOs maintain monopoly power, they retain an incentive to drop popular unaffiliated programming for their own services. But even if cable operators did not drop well-established popular program services, it is not enough that popular unaffiliated programming remains. The Commission itself acknowledges that Congress wanted to encourage the creation of <u>new</u> unaffiliated programming. <u>Second Report and Order</u> at ¶ 25. Thus, the Commission must set limits that leave sufficient room for new unaffiliated services.

2. PEG, must carry, and leased access channels should not be counted when calculating system capacity.

Another reason that the Commission's rules leave insufficient channel capacity for unaffiliated programming is its decision to count PEG, must carry, and leased access channels when calculating channel system capacity. The Commission cites as its rationale its desire not to "penalize cable operators who carry the broadest array of independent programming." <u>Second</u>

Report and Order at ¶ 54. As discussed above, must carry and leased access channels serve very different purposes. Likewise, PEG channels are available only to governmental institutions, educational organizations, and members of the public. Since non-affiliated video programmers cannot obtain carriage by means of either must carry or PEG channels, and are unlikely to do so through leased access, these channels should not be counted in determining the percentage of channels that should be available to non-affiliated programmers.

Failing to exclude these channels also contravenes the Senate's suggestion that channel capacity be determined after subtracting out channels devoted to broadcast, PEG, and leased access. The Senate Report states:

> [t]he FCC should establish these rules based on the number of activated channels less the number of over-the-air broadcast signals carried and the number of public, educational, and governmental and leased access channels carried.

S. Rep. at 80. The Senate Report is persuasive evidence that the Commission should exclude PEG, must carry, and leased access Channels from system capacity.[10]

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[10] In addition, the Commission's decision not to include local and regional networks as affiliated channels further weakens its regulations as a tool for curbing vertical integration. Congress did not allow for such an exception, nor does the Commission cite a valid rationale for allowing such an exception. As NATOA pointed out in its reply comments to the Commission, most local and regional networks are owned by large MSO's, and as such are part of the trend of vertical integration Congress meant to address with the Cable Act. See Reply Comments of the National Association of Telecommunications Officers and Advisors, MM Docket No. 92-264, at 10 (March 3. 1993) ("NATOA Reply").

3. The Commission's conclusion that a 40% limit is necessary to ensure an incentive to invest in new programming is not supported by the evidence.

The Commission stated that its rationale for adopting the 40% limit was to

> strike a balance between competing statutory objectives: to ensure that vertically integrated cable operators do not favor affiliated video programmers, or unfairly impede the flow of video programming to cable subscribers, on the one hand and, on the other, to encourage MSOs to continue to invest in the development of diverse and high quality video programming services.

Second Report and Order at ¶ 45. The Commission has overestimated the beneficial effects of vertical integration. For example, the Commission cited the House Report as reaching the conclusion that CNN, BET, and Nickelodeon are examples of innovative programming that would not have been feasible without vertical integration. Second Report and Order at ¶ 43. In fact, those channels became successful prior to their affiliation with any particular cable operator and before the trend of vertical integration in the cable industry had taken hold. However, there has been no successful launch of an unaffiliated video programmer since the cable industry began the trend toward vertical integration. Cable affiliation has become a prerequisite to secure or to retain access to cable systems.

Second, if the Commission were to set the limit at 20% as suggested by CME/CFA, there are many MSOs that could invest in new programming without coming close to that limit, and there are a great number of potential investors who are not affiliated with MSOs. The 40% limit will likely chill the development of independent programming by providing a disincentive to independent investors who may want to invest in video programming but feel there would be no way to get carriage on a cable system that also owns a substantial percentage of programming.

Thus, a 40% limit will fail to prevent MSOs from discriminating against unaffiliated programmers as Congress intended. CME/CFA therefore urge the Commission to adopt a 20% channel occupancy limit suggested by the Senate instead. S. Rep. at 80. A 20% limit, combined with the exclusion of PEG, must carry and leased access channels, will provide sufficient room for unaffiliated programmers on all cable systems, thereby increasing the diversity of information available to the public.

B. The Commission Should Reconsider its decision to Apply Limits only to the first 75 Channels.

The Commission should reconsider its decision to allow a 75 channel capacity beyond which channel occupancy limits do not apply. The future development of fiber optic cable, digital signal compression and other technologies has the potential to dramatically expand the number of channels available to consumers. However, consumers will not see increased diversity of sources unless channel occupancy limits are applied to all channels.

Channel occupancy limits are designed to prevent cable operators from discriminating against unaffiliated programmers. This rationale exists regardless of how many channels a cable operator offers to subscribers. Given the anti-competitive behavior of the large MSOs in the past, which was observed by